United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7435

To be argued by
BERNARD J. JAFFE

In The

United States Court of Appeals

For The Second Circuit

MURRAY GLADSTONE,

Plaintiff-Appellant,

vs.

FIREMAN'S FUND INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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STATEMENT

It is necessary to comment on certain statements contained in that portion of defendant's brief designated "Facts". As a preface to any discussion, it can be observed that throughout the defendant's brief the defendant relies heavily on the memorandum opinion in the court below. Without being disrespectful to Judge Werker, it is precisely his opinion which is the subject of this appeal; therefore, it would seem illogical to cite the opinion and to give such deference to it. This circular reasoning on the part of the defendant certainly provides no support for its position.

The defendant states that plaintiff has failed to make reference to the Jeweler's Block Rating Slip (37a). The Rating Slip is of questionable value in determining which answers in the Proposal were taken into consideration in fixing the premium. The Rating Slip gives the address of plaintiff's business as his Westwood, New Jersey, store. There is no indication that his business activities for the twelve month period prior to the signing of the Proposal were considered in preparing this document.

There are certain discrepancies in the defendant's treatment of the plaintiff's broker, W.M. Ross & Co., and the defendant's special agent, Robert Forrester. The defendant would have the Court believe that the plaintiff's broker was actually the defendant's authorized agent when the broker

telephoned the defendant advising it of plaintiff's loss, and subsequently followed with written notice of loss. The plaintiff in its brief has cited both statutes and cases showing that the broker acted as the plaintiff's agent when notice of loss was sent to the defendant; therefore, there is no need to repeat such argument here. The defendant conversely states that Mr. Forrester acted as the plaintiff's agent when determining what answers were to be inserted in the questions contained in the Proposal. The Court's attention is directed toward the argument in plaintiff's brief differentiating an insurance broker from an insurance agent.

It is also contended by the defendant that the issue of defendant's failure to return the premium was not raised in the court below. This contention is clearly refuted in the record. The Court has only to look at the affidavit of Leo Laurance (61a, 62a) to see that this issue was squarely raised.

While the defendant relies heavily on the decision below, it would appear that it does not wish to be bound by all of the facts which were determined. The defendant is critical of the plaintiff's statement that it did not actually receive the Jeweler's Block policy until June 18, 1971. The defendant goes so far as to accuse the plaintiff of deliberately attempting to mislead this Court. The choice of June 18 was not plucked by the plaintiff out of thin air but rather was

specifically stated as a fact in Judge Werker's decision (101a). It is most unfortunate that defendant finds it necessary to make unprofessional characterizations without even perusing the opinion in which it holds so much faith.

Defendant's position that the date of receipt of the policy is of no consequence because a binder was issued has no support. Even the language which the defendant quotes is contrary to its position. It states that the policy terms and provisions are controlling with respect to the "coverage afforded" by a binder. Conditions precedent and non-waiver provisions have nothing to do with coverage. Defendant's attempt to obscure this difference by citing and quoting from J.C. Smith & Wallace Co. v. Prussian Natl. Ins. Co., 68 N.J.L. 674, 54 A. 458 (1903), is equally unavailing. The language quoted, especially that to which there is supplied emphasis, is misleading. By "all terms of the policy" the court was referring to all the essential terms of an insurance policy to wit, "parties thereto, a premium, a subject-matter, an insurable interest, certain risks or perils, duration of risk and amount insured" (at 676). The court states that these are the terms which when omitted from a binder are presumed to be the same as those contained in the usual policy or the same as in a former policy where one existed.

Those statements presented in the defendant's brief which are not discussed herein are adequately covered in the plaintiff's brief.

The defendant lists eleven "undisputed and admitted facts". These eleven statements are replete with characterizations by the defendant. Such characterizations and subjective interpretation are in direct conflict with the plaintiff's position and therefore can neither be considered undisputed nor admitted.

THE STATEMENT UNDER RULE 9(g)

That portion of the defendant's brief dealing with the Statement Under General Rule 9(g) requires little comment. The defendant has obviously misstated the rule, reproduced in the Aldendum to plaintiff's brief. Although the defendant's loosely veiled accusations could be answered in kind with even greater force and credibility, the plaintiff's counsel would not question the veracity of a fellow attorney.

SUMMARY OF ARGUMENT

I. The plaintiff is not bound by the answers contained in the Proposal where the answers were formulated and inserted by the defendant's special agent. Forrester was guilty of affirmative negligence when he insisted that the answers required by the questions in the Proposal were to be given on the basis of the plaintiff's new business, assuming arguendo that it is determined that such answers are incorrect.

II. The actions of the defendant constitute a waiver of the requirements of the conditions precedent. The assurances

made by Carl Grimm that everything was in order lulled the plaintiff into thinking that he had fulfilled all the requirements of the policy, which he had not as yet even received, and constituted a waiver on the part of the defendant.

III. There has been no showing of a likelihood of appreciable prejudice and therefore there can be no forfeiture for a breach of any condition precedent. New Jersey has found forfeitures to be so repugnant that it now requires the insurer to prove that there exists a likelihood of appreciable prejudice.

IV. The defendant's election to issue the policy and retain the premium estopped it from claiming any defenses whatsoever under the policy. Even if it is decided that all the defendant's other arguments are correct, there can be no question that the defendant is bound by its election to retain the premium.

ARGUMENT

POINT I

THE PLAINTIFF IS NOT BOUND BY THE ANSWERS CONTAINED IN THE PROPOSAL WHERE THE ANSWERS WERE FORMULATED AND INSERTED BY THE DEFENDANT'S SPECIAL AGENT

The defendant states in its brief that the plaintiff has argued two separate and conflicting legal theories dealing with the questions and answers contained in the Proposal.

On the contrary, the plaintiff's argument is both logical and consistent. As stated, it is plaintiff's contention that the answers supplied to the disputed questions in the Proposal are correct, given the ambiguous language contained therein. It is further stated that the answers were inserted by the defendant's special agent and underwriter after he had received all information regarding the plaintiff's past business activities. Mr. Forrester continually stated that the questions were to be answered based upon the plaintiff's new business (68a).

The defendant reasons that the plaintiff takes this approach to avoid a confrontation with the parol evidence rule. Notwithstanding the two cases cited by the defendant at the beginning of Point I in its brief, the parol evidence rule is inapplicable to the case at hand. The language quoted in the plaintiff's brief from Harr v. Allstate Ins. Co., 54 N.J. 287, 304, 255 A.2d 208, 218 (1969) clearly shows the error in the defendant's position. Irrespective of the defendant's attempt to avoid the holding in Harr, there can be no question that Dewees v. Manhattan Insurance Co., 35 N.J.L. 366 and its progeny are no longer the law of New Jersey. Even if the defendant were correct in asserting that the quoted language was dictum, it misstates the obligation of a federal court sitting in a diversity case. Where the highest court of a state has definitively stated what it believes the law of the state should be, that opinion must be followed.

The defendant's attempt to distinguish the Harr case (POINT IV) also fails. It is stated that that case involved a situation of affirmative negligent conduct. That is precisely what is involved in the present case. As previously stated, the defendant's special agent repeatedly told the plaintiff how to answer the questions contained in the Proposal and then inserted such answers therein. The plaintiff relied on Forrester to know how these questions were to be answered, especially after having provided him with a complete history of his past activities.

There is no merit in the defendant's argument that the plaintiff should be treated differently from other applicants for insurance because of his prior experience as a jewelry merchant and with jeweler's block insurance policies. The fact that the plaintiff was in the jewelry business and had previously obtained jeweler's block insurance did not qualify him as an expert on insurance policies. If such an argument were to prevail, then it could be said with equal force that a person who had been driving for an extended period of time and who had obtained several policies of automobile insurance had therefore become an expert on automobile insurance policies. This reasoning is obviously absurd.

The defendant contends that it was necessary for the defendant to have knowledge as to the plaintiff's past business activities in order to correctly evaluate the risk in issuing

an insurance policy. Therefore, it is stated that the questions contained in the Proposal were not ambiguous, but highly relevant to the premium which would be charged. It is stressed that this information was highly relevant because of the plaintiff's prior involvement in the jewelry business. If the plaintiff's prior business activity in a completely different type of operation in the jewelry field were so relevant, then plaintiff's prior experience in any business activity, even if unrelated, would also be relevant. Certainly the defendant could have worded the questions in the Proposal much more clearly if such had been the intent.

POINT II

THE ACTIONS OF THE DEFENDANT CONSTITUTE A WAIVER OF THE REQUIREMENTS OF CONDITIONS PRECEDENT

The defendant seeks to undercut the importance of the case of Radwanski v. Scottish Union and Natl. Ins. Co., 100 N.J.L. 192, 126 A. 657 (1924) by citing it as support of its argument that there was no waiver. The law stated in Radwanski is clear, however:

> But, even if be considered that the proof of loss did not comply with the provision of the policy, the motion to nonsuit for this particular reason was properly refused. The defendant had denied any liability under the policy, and there was no proof that the denial was based upon the failure of the plaintiff to comply with this particular provision in the policy. In the absence of such proof, the denial is evidence of a waiver of the defendant's

> right to require such compliance (State Insurance Co. v. Maackens, 38 N.J.L. 564), and the question of waiver vel non must be settled by the jury.

It is stated in the defendant's brief that the case is inapplicable to the present case, because there was no general denial within the 60 day time period for filing sworn proof of loss. The defendant has obviously overlooked the case of Weil v. Pennsylvania Fire Ins. Co., 58 N.J. Super 145, 152, 155 A.2d 781, 785 (1959), wherein the court stated:

> During all of the foregoing negotiations, which commenced long before the deadline for the filing of the proof of loss and continued until long after, there was not the slightest suggestion to the plaintiff that proof of loss other than that which he had submitted was required. On the contrary, as we have seen, after the 60 days within which defendant now says the proof of loss should have been filed had expired, appellant asked plaintiff to obtain the police report, and assured him the claim was still under investigation on its merits. Under these circumstances, even if the policy were construed to require a proof of theft loss within 60 days, the company waived the requirement, and is now estopped from asserting it.

See also Highway Trailer Co. v. Donna Motor Lines, Inc., 46 N.J. 442, 217 A.2d 617 (1966), and McConnell v. Fireman's Fund Ins. Co., 178 F.2d 76 (5th Cir., 1949).

Not only are the conditions described in Radwanski, supra present, but the defendant also lulled the plaintiff into thinking that no further proofs of loss were required, by the assurances made by Carl Grimm to the plaintiff that everything was in order (54a).

POINT III

THERE HAS BEEN NO SHOWING OF A LIKELIHOOD OF APPRECIABLE PREJUDICE AND THEREFORE THERE CAN BE NO FORFEITURE FOR A BREACH OF ANY CONDITION PRECEDENT

Point III of the defendant's brief relies on the case of Whittle v. Associated Indemnity Corp., 130 N.J.L. 576, 33 A.2d 866 (1943), and its progeny for the proposition that failure to fulfill a condition precedent of an insurance policy results in a forfeiture of protection regardless of whether the company has been prejudiced by such failure.

Whittle, and the other cases which the defendant has cited which all make reference to Whittle are no longer the law of New Jersey and haven't been since 1968 when the decision of the New Jersey Supreme Court in Cooper v. Government Employees Ins. Co., 51 N.J. 86, 237 A.2d 870, was reached. The defendant vainly attempts to resurrect Whittle by minimizing the importance of Cooper.

Cooper discusses the holding of Whittle that prejudice need not be shown. In its discussion, the court in Cooper states that it must choose between staying with the holding in Whittle or acknowledging that the position taken in Whittle has since been overrun. It is the latter conclusion which is reached. In rejecting Whittle the court stated at 51 N.J. [illegible] 237 A.2d 873:

> And although the policy may speak of the notice provision in terms of "condition precedent," as Whittle observed, nonetheless what is involved is a forfeiture, for the carrier seeks, on account of a breach of that provision, to deny the insured the very thing paid for. This is not to belittle the need for notice of an accident, but rather to put the subject in perspective. Thus viewed, it becomes unreasonable to read the provision unrealistically or to find that the carrier may forfeit the coverage, even though there is no likelihood that it was prejudiced by the breach. To do so would be unfair to insureds. It would also disserve the public interest, for insurance is an instrument of a social policy that the victims of negligence be compensated. To that end companies are franchised to sell coverage. We should therefore be mindful also of the victims of accidental events in deciding whether a forfeiture should be upheld.
>
> The insurance contract not being a truly consensual arrangement and being available only on a take-it-or-leave-it basis and the subject being in essence a matter of forfeiture, we think it appropriate to hold that the carrier may not forfeit the bargained for protection unless there are both a breach of the notice provision and a likelihood of appreciable prejudice. The burden of persuasion is the carrier's.

The court's reasoning in Cooper is equally applicable to a condition precedent involving a sworn proof of loss. The same inequitable forfeiture is present.

Cooper is clearly the law of New Jersey in all cases, regardless of the holding in J.A.G. Trucking v. The Continental Ins. Co. (N.Y.L.J., p. 17, May 8, 1975, Supreme Court), which is quite obviously ignorant of the decision. Cooper has been cited over and over again as holding that forfeiture can not occur where a condition precedent has not been fulfilled in the absence of a showing of the likelihood of appreciable

prejudice. Whittle, on the other hand, has not even been cited once in this context since 1968 by any court in New Jersey.

It is most interesting that the defendant refers to the language cited in Cooper as dictum (POINT III) and then states that the Supreme Court of New Jersey has not subsequently made this the rule in New Jersey as far as is known. In a case decided the same day as Cooper, Vassilakis v. Glen Falls Ins. Co., 51 N.J. 96, 101 (1968) states:

> We add that with respect to the subject of prejudice, which was tried as an incident to the claim of breach and which we have this day held must be shown in addition to a breach, Cooper v. Government Employees, Ins. Co., supra, 51 N.J. 86, the trial court found as a fact that prejudice was not proved. In these circumstances, the judgment of the trial court should be affirmed.

Vassilakis did not involve an automobile liability policy. In that case an insurance policy was issued to the operator of a restaurant. Therefore, the holding in Cooper can not be said to apply only to "innocent" purchasers of automobile insurance policies.

POINT IV

THE DEFENDANT'S ELECTION TO ISSUE THE POLICY AND RETAIN THE PREMIUM ESTOPPED IT FROM CLAIMING ANY DEFENSES WHATSOEVER UNDER THE POLICY

As previously stated, the defendant's contention that this issue was not raised in the court below is without any

basis in fact. Even if the defendant were successful in all its other arguments in support of the lower court's decision, it has no answer for this final point.

The defendant's feeble attempt to distinguish the case of New Jersey Rubber Co. v. Commercial Assur. Co., 64 N.J.L. 580 (E. & A. 1900) is entirely transparent and without foundation. It is significant that the defendant makes no attempt to distinguish the cases of Merchants Ind. Corp. v. Eggleston, 37 N.J. 114, 179 A.2d 505 (1962) and Englishtown Auc. Sales v. Mt. Vernon Fire Ins., 112 N.J. Super. 333 (1970). It is obvious that they can not be distinguished from the case at hand.

CONCLUSION

For the foregoing reasons, judgment of the District Court granting the defendant-appellee's motion for summary judgment should be reversed.

Respectfully submitted,

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Of Counsel

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MURRAY GLADSTONE
Plaintiff= Appellant

- against -

FIREMAN'S FUND INSURANCE CO.
Defendant- Appellee

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York

That on the 17th *day of* November *19*75 *at* 99 John Street, New York, N.Y.

deponent served the annexed Brief *upon* BIGHAM, ENGLAR, JONES & HUSTON ESQS.

the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein.*

Sworn to before me, this 17th *day of* November *19* 75

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Victor Ortega

VICTOR ORTEGA